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No. 88-1659

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

THEODORE KANNE and
BEATRIZ KANNE,

Petitioners,

vs.

CONNECTICUT GENERAL
LIFE INS. CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In its Brief in Opposition to Petitioners' Petition for Writ of Certiorari, respondent does not deny that throughout these proceedings, respondent and its prior counsel took the position that the questions presented by the Kannes' petition were of great national importance, meriting the Amicus Curiae

intervention of the United States Government, among others. See, e.g., Petition at pp. 23, 25, FN 14, 53. [1] Respondent now attempts to ignore its previous statements, arguing that the first question is not really that important (RB at pp. 3-7). We respectfully disagree with that contention (Point I, infra).

Respondent does not seriously deny that the second question--the issue of the criteria necessary to establish that a group insurance arrangement is an employee benefit plan subject to ERISA (see Petition, pp. i-iv, Questions 2a and 2b)--is of critical national importance. Respondent therefore attempts to evade

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1. References herein to "Petition" refer to the Kannes' Petition for a Writ of Certiorari, docketed April 11, 1989. References to "RB" refer to Respondent's Brief in Opposition, dated June 1, 1989.

the issue, by claiming, among other things, that the second question was not properly presented because, respondent says, the Kannes never disputed the existence of an employee benefit plan subject to ERISA (RB at pp. 7-10).

This claim is simply untrue. The Kannes disputed the existence of an ERISA plan in the District Court, in their original responsive brief on the appeal to the Ninth Circuit Court of Appeals, and in all other briefs they have filed in this case (Point II, infra). [2]

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2. Respondent cites no reference for its claim that the issue was not properly raised or preserved. It refers to a statement in the Kannes' Petition that the issue of ABC Trust's status as an "ERISA employer" was never contested (e.g., RB at p. 9). However, this issue was not contested because respondent never claimed that ABC Trust was an "ERISA employer," and only claimed that the involvement of Mr. Kanne's direct employer established an ERISA plan (see Point II, infra).

Respondent's present attempt to sidestep this issue with this contention, and the others it presents, demonstrates that respondent does not, and cannot, deny that this issue must be resolved by this Court in light of the literally millions of employees throughout this country who are utterly dependent on employee group insurance to cover them when catastrophe strikes. We respectfully submit that this Court should resolve this issue now, rather than permit the confusion and uncertainty to proliferate, causing grave detriment to the economical and efficient administration of justice in the federal courts, as well as the courts of all 50

states. [3]

I

THE ISSUE OF WHETHER STATE REMEDIES MAY BE APPLIED TO STATE LAWS REGULATING INSURANCE IS A WIDESPREAD AND IMPORTANT NATIONAL ISSUE.

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3. Under the situation now prevailing, every suit for delay or denial of benefits in an employee group insurance policy will be subject to threshold litigation on the issue of whether such a policy is an employee benefit plan governed by ERISA. Without guidance from this Court, the federal and state courts will continue to apply conflicting and amorphous standards in their struggle to resolve this issue.

Indeed, respondent recognizes the inconsistencies that have already arisen on this subject, in its discussion of two California Court of Appeal cases. Respondent attempts to dismiss them because they are not decisions of courts of last resort (RB at p. 14). The point is, however, that numerous lower courts, both state and federal, will be wrestling with this issue, all of necessity relying on authorities that are conflicting and not determinative. The California cases, as well as numerous others, illustrate the mushrooming nature of the issue.

Respondent relies on the prospective abolition of the private right of action in California as a basis for its claim that the first question presented by the Kannes' Petition is not important (RB at pp. 3-7). We respectfully submit this argument is without merit. There is no question that the States have an overriding interest in protecting their citizens from unfair insurance practices, which all too often have the effect of placing the ill and disabled in positions of dependency on State assistance programs. As pointed out in our Petition, the California Supreme Court has specifically stated that the Legislature has the power to reinstate the right of action prospectively abolished by the Court's decision in Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d 287, 758 P.2d 58 (1988)

(Petition at pp. 25-26). Other states similarly have enacted laws aimed at deterring unfair insurance practices or may wish to consider doing so. We respectfully submit that this Court should issue a clear, definitive pronouncement on the issue of whether ERISA blocks enforcement of such laws where ERISA plans are involved.

Moreover, respondent has not explained how the Court of Appeals' interpretation of this Court's decision in Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549 (1987) can be reconciled with the plain words of the relevant statute, which exempts State laws regulating insurance from the enforcement provisions of ERISA (see

Petition at pp. 28-29). [4] Nor does respondent deny our statement that nothing in the legislative history of ERISA shows that Congress intended to interpret the saving clause in the manner in which the Ninth Circuit has interpreted it in this case. We respectfully submit that it is clear that an erroneous interpretation of an act of Congress of such widespread impact is in itself sufficient to merit consideration by this Court, and particularly when the subject affects literally millions of employees throughout the country.

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4. Respondent does not deny that California Insurance Code section 790.03(h) is a State law regulating insurance.

II

RESPONDENT IS INCORRECT IN ITS STATEMENT THAT PETITIONERS DID NOT PROPERLY RAISE OR PRESERVE THE ISSUE OF WHETHER OR NOT RESPONDENT'S INSURANCE POLICY CONSTITUTED AN ERISA PLAN.

As observed above, there is no merit to respondent's claim that petitioners did not properly raise or preserve the issue of whether the insurance policy constitutes an employee benefit plan governed by ERISA (RB at pp. 7-10). Respondent raised the issue in the District Court and the District Court found that the insurance arrangement was an ERISA plan (Appendix to Petition, p. A-12). On appeal, the Kannes' responsive brief, dated and served January 13, 1986, specifically contested respondent's contention that there was an ERISA plan,

citing Taggart Corp. v. Life & Health Benefits Admin., 617 F.2d 1208 (5th Cir. 1980), cert den. sub. nom., Taggart Corp. v. Efros, 450 U.S. 1030, 101 S.Ct. 1739 (1981) and Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) (Appellee's Responsive Brief at pp. 6-8).

This issue was also consistently raised thereafter by the Kannes in the Court of Appeals in their Supplemental Brief and in their two Petitions for Rehearing. Never, at any time until now, did respondent ever claim the issue was not properly raised.

However, the issue presented by respondent and litigated in the District Court was the claim that Mr. Kanne's actual employer, Harlow Carpets, had established or maintained an employee benefit plan subject to ERISA. Respondent did not raise or litigate any

claim that the ABC Trust was an employer group within the meaning of 29 U.S.C. section 1002(5), and that issue was never litigated (see Petition at p. 20, Appendix D to Petition at p. 86). The Court of Appeals thus made two rulings: (1) it rejected the claim that respondent actually litigated--respondent's claim that Mr. Kanne's direct employer had established or maintained an ERISA plan and (2) on its own motion, it decided an issue that was not litigated--that ABC Trust's activity as an employer group supported the finding that an ERISA plan was involved. [5]

Obviously, the fact that respondent did not litigate this latter claim does

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5. As we pointed out in our Petition for Rehearing to the Court of Appeals, filed October 17, 1988, respondent did not even claim on appeal that ABC Trust was an "ERISA employer" (Petition for Rehearing at p. 12).

not inure to respondent's benefit, since respondent had the burden of proving that federal law is applicable. Metropolitan Life Ins. Co. v. Taylor, 107 S.Ct. 1542, 1546 (1987).

Respondent does not now claim, and never attempted to prove, that individual employers played any part in the management of ABC, or that ABC consisted of homogeneous related employers, as required in order for it to be an "ERISA employer" (see Petition at pp. 47-49). Respondent's Opposition does not deny that these elements are necessary, and does not claim that they were proven (RB at pp. 10-11). Respondent claims only that "petitioners failed to dispute the existence of an ERISA plan at trial or even on appeal except on rehearing, so that it is understandable that Connecticut General had no opportunity to

respond with evidence to these tardy objections by petitioners." (id at p. 11). This statement is incorrect. As shown above, petitioners did dispute the existence of an ERISA plan at trial and on appeal. Moreover, since it was incumbent on respondent to establish that an ERISA plan existed, respondent had the burden of adducing this evidence. Respondent did not do so and, indeed, as indicated above, respondent never even attempted on appeal to claim that ABC was an "ERISA employer" (see FN 5, supra).

Respondent interprets our Petition as an attempt to urge that the criteria of the Department of Labor regulations are incorrect (RB at pp. 12-15). Respondent misapprehends the point. The question of whether the Department of Labor regulations are the determinative criteria is the subject of a conflict

among the decisions (see Petition at pp. 45-47), and is a question which requires resolution by this Court.

Respondent also attempts to avoid review of this urgent issue by characterizing it as a "highly fact-specific question" (e.g., RB at p. 7). We respectfully submit that it is not a "fact-specific question," but a question of law concerning what criteria or elements will satisfy the statutory definition of an employee benefit plan. At this juncture, the bench and bar do not have an answer to this question to apply to the literally thousands of cases that will inevitably arise that require resolution of this question. We therefore respectfully submit that it is urgent that this Court furnish this answer.

Conclusion

The Kannes' Petition should be granted.

Respectfully submitted,

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